

INTERAGENCY ADVISORY GROUP

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Minutes of the IAG Committee on Employee Relations

September 21, 1979

Wilma Lehman, Acting Chief, Employee Relations Branch, Workforce Effectiveness and Development Group, chaired the meeting, assisted by Cynthia Field, also of the Employee Relations Branch. Mrs. Lehman first asked which members were going to present oral arguments at the MSPB hearing on the legality of Part 432, to be held on September 27, 1979. Those doing so were asked to attend a meeting before the hearing.

Discussion of MSPB decisions

Part 752 actions decided

Mrs. Field gave statistics on Part 752 adverse action decisions by MSPB. As of September 21, OPM had received copies of 352 substantive decisions. (These do not include decisions of no purview, untimeliness, dismissal without prejudice, etc. Of course, some no purview decisions have had substantial effects, e.g., the fact that reduction or discontinuation of standby pay is not an adverse action under Part 752.) In these decisions, MSPB presiding officers upheld 304 (86%) actions, reversed 16 (4%) for harmful procedural error, and reversed 34 (10%) for merit reasons. The vast majority of actions appealed were removals.

Mrs. Field discussed Part 752 decisions by MSPB which highlighted some points of interest for members:

- Two decisions showed that MSPB is apparently considering the requirements of negotiated agreements in the same way as it has considered those of agency regulation.
- Several agency actions have been reversed because of mislabelled reasons for action, or because performance-based reasons were identified as conduct reasons and vice versa.
- One decision had a discussion of adverse actions taken some time after the incidents of misconduct which triggered them.
- Another decision had a discussion of when it is appropriate to use approved leave as a cause for adverse action.

In connection with the last item, she said that the WED and Compensation Groups plan to issue a joint letter on the subject of absenteeism as a cause for adverse action -- something which staff of the two groups have long been considering.

Part 432 Actions Decided

Mrs. Lehman said that there had been 22 substantive decisions on performance-based actions under Part 432. Of these, 19 (86%) affirmed the agency actions, two (9%) were reversed for procedural reasons, and one (5%) was reversed on the merits. The last case was reopened by the Board, and OPM has filed a brief on it. The two cases reversed on procedural reasons involved situations where the employee had not been given the critical elements 30 days in advance. Three cases had EEO allegations.

Mrs. Lehman was concerned with the implications of one case in which the agency had taken action under Part 752 based both on performance and conduct reasons. The agency action was sustained, but the presiding officer applied Part 432 requirements to the performance issues, and Part 752 requirements to the conduct issues. Informal advice from MSPB and earlier OPM guidance has been that actions taken properly under Part 752 need only meet the requirements of that part. We understand that this case will be reopened.

In the discussion following, members expressed several concerns about the appellate process:

- One member noted that his agency had problems in one instance in getting evidence before the presiding officer: evidence which was not originally included in the agency submission to the MSPB. The agency lost a case because of this. Other members noted similar problems.
- Another pointed out that an activity in his agency had not submitted affidavits with the case file, after which the appellant waived the right to a hearing. The agency lost the case because of incomplete documentation.
- A member discussed the proper use of a factual analysis of the evidence and issues in a case, which the deciding official considered and which was included in the case file. (Since the meeting, MSPB has issued its initial decision on this case, in which the presiding officer found the use of the factual analysis was proper.)
- Members talked about the question of the way in which presiding officers should determine whether the penalty imposed is correct. In a few instances, the presiding officers, rather than determine whether the penalty was not in accordance with agency policy or practice or whether the agency abused its discretion, looked to see whether the penalty was supported by a preponderance of the evidence. Members questioned the correctness of this application of the standard of evidence. (There are several cases which have been reopened on this issue on which OPM has published or will publish briefs.)

- A member mentioned unpublished GAO opinions which said that his agency can pay an appellant's way from a western state to a hearing in the Washington, D.C. field office.

Finally, Mrs. Lehman noted that 16 agencies, two unions, and one individual have commented on proposed Part 771. In response to questions, Mrs. Lehman said that she intends at present to recommend that the application of performance standards and critical elements be grievable, not the content or substance in the abstract. In other words, the individual cannot complain that a particular standard is too high until it is applied. She intends to have optional coverage of probationary separations and returns of probationary supervisors and managers from initial supervisory and managerial assignments. However, analysis of all comments has not as yet been completed.